# Petition

83-673

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No. _____

IN THE

# Supreme Court of the United States of America

OCTOBER 1983 TERM

GERALD WISDOM
*Petitioner*
v.
Department of Housing and Urban Development, Donald C. Alexander, Director of IRS, William E. Simon, Secretary of Treasury, Charles Casey, J. Leo Langston, Jr., G. William Miller and Jerome Kirtz
*Respondents*

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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## OPINIONS BELOW

The Opinions of the District Court for the Eastern District of Arkansas are unreported. They are appended to this Petition at pages 15-28 and 29-31.

The Opinion of this Court of Appeals for the Eighth Circuit is reported at 713 F. 2 422.

## JURISDICTION

The judgment of the Court of Appeals for the Eighth Circuit was made and entered on August 10, 1983. The jurisdiction of this Court is involved under 28 USC 1254(1).

## QUESTIONS PRESENTED

1. Whether the Court below erred in holding that a Federal Agency which failed to promulgate on regulations pursuant to 5 USC 522a(e) (The Privacy Act) for the disclosure of information pertaining to individual, is not liable to an individual for damages caused by the intentional disclosure by the agency to another agency pursuant to Rules set forth in a collection handbook compiled years prior to the enactment of the Privacy Act.

2. Whether the Court below erred in holding as constitutional regulations of the Comptroller of the Currency which permit one agency without notice, to seize and hold wages of an employee of another agency and seize without notice, the retirement account of an employee of another agency for a debt owed by the government employee to that agency.

## CONSTITUTION PROVISIONS, STATUTES AND REGULATIONS INVOLVED

1. The Fifth Amendment of the Constitution of the United States:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be take for public use, without just compensation.

2. 4 CFR §102.2 ..... Appendix 43
4 CFR §102.5 ..... Appendix 43
24 CFR §§17.20 - 17.35 ..... Appendix 44
5 USC §522 a (b) ..... Appendix 33
5 USC §522 a (e) ..... Appendix 34
5 USC §522 a (g) (5) ..... Appendix 37
PL 94-183 ..... Appendix 40

3. Cases cited:
Addison v Holly Hill Fruit Products, 322 U.S. 607 ..... 8
Atwater v Roudenbush, 452 F.Supp. 622 ..... 11
Fuentes v Shavin 407 U.S. 67 ..... 11
Omstead v U.S., 277 U.S. 438 ..... 9
Sniadach v Family Finance Corp., 395 U.S. 337 ..... 11

## STATEMENT OF CASE

This litigation arises from the resignation of petitioner, Gerald C. Wisdom, who was until August 6, 1976, a revenue collection officer with the Internal Revenue Service, employed at Pine Bluff, Arkansas, with a GS-11 rank and 16½ years of service with the government of the United States of America. Prior to his employment in Pine Bluff, Wisdom, whilst employed by the Internal Revenue Service in Texarkana, had obtained a Title I loan from the Oakland Bank of Texarkana, Texas. The loan was guaranteed by the Department of Housing and Urban Development (hereinafter HUD). Wisdom defaulted on the loan early in 1975 and on May 12, 1976, the Oakland Bank collected on the guarantee from HUD. The account was forwarded to the HUD office at Shreveport, Louisiana. Thereafter agents or employees of HUD contacted petitioner's superiors at the Internal Revenue Service in Little Rock, Arkansas, concerning the default of the loan at Texarkana Oakland Bank. Charles Casey and J. Leo Langston, Wisdom's superiors, met with him and secured his resignation from the Internal Revenue Service on August 6, 1976. His pay check for July 1976 was not paid to him until after he made application for his retirement. The defaulted loan was then paid without notice to him from his retirement account. Suit was filed on January 5, 1977, alleging violation of the Privacy Act (5 USC§522a) an unconstitutional seizure of defendant's retirement funds, and violation of 42 USC§1985(1). The Honorable Oren Harris, Judge of District Court for Eastern District of Arkansas, dismissed the case. On appeal to the Eighth Circuit, the Circuit Court vacated the dismissal order with instructions that District Court retain jurisdiction whilst Wisdom pursued his remedies with the Merit Systems Board. After an unfavorable result at the hands

of the MSPB, Wisdom filed an amended complaint in the District Court asserting the same claims which had been raised in his original complaint.

The District Court granted the United States' Motion for Summary Judgment on the claims raised under the Fifth Amendment and 42 USC §1985(1). The Privacy Act claim was tried to the Court. The District Court held that disclosure by HUD to the IRS of information concerning Wisdom was made pursuant to regulations and *therefore not* intentional or wilful and dismissed the case. On the second appeal the Court of Appeals for the Eighth Circuit affirmed the District Court's judgment as to the Privacy Act claim an Fifth Amendment claim and reversed as to the 42 USC §1985(1) claim. This petition relates to the Privacy Act and Fifth Amendment claims raised in the original and amended complaint to the dismissal of which the Court of Appeals affirmed.

## REASONS FOR GRANTING THE WRIT

### I

In holding that HUD's violation of the Privacy Act was not wilful the Circuit Court of Appeals has ignored the express intent of Congress as set forth in the Act which permitted the assertion of claims against an agency for violation of the Act only after September 27, 1975. The petitioner's claim arose on August 6, 1976, Congress enacted the Privacy Act on December 31, 1974, 270 days after its enactment the main provisions became effective. Pursuant to 5 USC §522 (a) (e) the agencies were directed to promulgate rules of conduct, establish appropriate administrative safeguards and publish in the Federal Register notice of a new use or intended use of the information concerning individuals. HUD did nothing. HUD months after the passage of the Act which mandated that "No agency shall disclose . . .", with eleven specific exceptions, except upon written consent of the person concerning his information, made disclosure to the IRS concerning Gerald Wisdom in violation of that Act.

Congress in enacting the Privacy Act was mindful of the import and the significance of the legislation and its impact upon the manner in which Federal Agencies did business. Congress did give the Federal Agencies 270 days (9 months) to get their houses in order. Congress used the words, "shall become effective" shall used in the context is mandatory. It is significant that Congress in Public Law 91-183 enacted on December 31, *1975, one year after the Privacy Act had been enacted amended Section 5 USC*§522 a(g) (5) by striking out the words "the effective date of this section" and substituting "to September 27, 1975." Congress three months after the effective date of the Act and the civil penalties provision

of the Act could have if Congress had desired, at that time postponed the effective date of the civil penalties provisions. Congress did not.

The fact that there was no postponement of the effective date of the civil penalties provision is significant in measuring the intent of Congress in the implementation of the Privacy Act. Presumable preliminary drafts or perhaps even the annual report of the Privacy Commission had been submitted to Congress which would have been important the decision of Congress to retain the same effective date when Congress enacted P.L. 94-183.

The Circuit Court of Appeals has engrafted on to the words "shall become effective" a proviso excusing an agency for violations of the Act after its effective date if the agency has failed to obey the law (5 USC 522a(e) ) and made a disclosure pursuant to rules set forth in a decade old handbook. The Court of Appeals excuse for not finding liability because the Privacy Act was "relatively recently enacted and its ramifications not perfectly clear; the particular provision at issue had not been challenged" ignores the plain unambiguous language of the statute. "No agency shall disclose" information on an individual all else is surfeit. The Court of Appeals has ignored the well established rules of statutory construction.

"The natural meaning of words cannot be displaced by references to difficulties in administration." *Addison v Holly Hill Fruit Products*, 322 U.S. 607 at 617. The Court of Appeals on the Privacy Act claim is diametrically opposed to Addison *supra*.

The Eighth Circuit Court of Appeals is in this case establishing an extremely poor precedent. The Court is saying to all Federal Agencies: Acts of Congress

may safely be ignored for at least 10 months after the effective date of any Act and up to 19 months after its enactment or until the conduct forbidden in the Act is challenged in Court, and then the old saw "every dog gets one bite" applies. This rule is contra to the now recognized rule set forth so eloquently by Justice Brandise in his dissent in Omstead v U.S. 277 U.S. 438 in which he stated:

> Decency, security and liberty alike demand that government officials shall be subjected to the same rules of conduct that are commands to the citizen. In a government of laws, existence of the government will be imperilled if it fails to observe the law scrupulously. Our Government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example, Crime is contagious. If the Government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy.

In this case HUD did not break the law once but twice; first when HUD ignored the provisions of USC §522(a) (e) and (5) by failing to promulgate regulations and rules covering the disclosure of information contained in the agency's record covering individuals and second, when HUD disclosed to IRS in violation of 5 USC 522a(b) Wisdom's defaulted loan.

The government in this case has been a very poor teacher and the government would not for one minute countenance such cavalier regard of its laws by its citizens as it has manifested in this case. The Court of Appeals cites no case to support the proposition that Federal Agencies are exempt from civil penalties because that agency's violation of the law results from the ignoring of the law. The lack of citation arises because the government does have to obey the law and this

Court should set the record straight.

II

The Court of Appeals in holding constitutional the regulations[1] under which HUD first seized and held Wisdom's pay check without notice and any type of hearing until after he had resigned and made application for his retirement account at which time HUD again without notice or a hearing seized the funds it claimed were due HUD. HUD's claim was unliquidated and unsecured. Wisdom had defaulted on a loan at the Texarkana Oakland Bank. His obligation to HUD was not primary, but secondary, and any obligation to HUD arose only after HUD had paid the loan under guarantee agreement with the bank. HUD had made no demand of Wisdom for the payment of any sum before it took the action with respect to his salary. In this respect HUD's actions were violative of its own regulations §24 CFR.17.20-§17.35 because HUD made no attempt to contact Wisdom prior to affecting a seizure of his July 1976 pay check.

It is true "there is no constitutional requirement that debtor be allowed to negotiate settlement on debts owed the government" as stated by the Court of Appeals. It is also true that the Fifth Amendment of the Constitution of the United States prohibits that government from depriving any person of life, liberty or property without due process, HUD's collection procedure in this case ignored due process completely.

The record does not support the Court of Appeals' assertion that his property was available to him nor

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[1] 4 CFR §102.2
4 CFR §102.5
24 CFR §§17.20 - 17.35

being used by him for necessities of life. The constitutional claim was adjudicated by summary judgment and the petitioner's complaint thus taken as true presents a different situation as found by the Court of Appeals. HUD seized and held his pay check for the month of July 1976. The check was not released until after he agreed to make application for his retirement account. The Fifth Amendment does not distinguish between Federal Government employees and other citizens. HUD could not have taken the steps it took if Wisdom had been employed by a private employer. As an unsecured creditor of an unliquidated debt, HUD was bound by the same due process as was Family Finance Corporation in *Sniadach* v *Family Finance Corporation* 395 US 337 (1969). Due process may not require a hearing before an action is taken. However, the fact that a hearing is not required does not alleviate the requirement of notice prior to that action. In this case HUD's actions were taken without notice to Wisdom. In the case relied upon the Circuit Court of Appeals deny any due process *Atwater* v *Roundebush*, 452 F. Supp. 622 held that due process was to be afforded a government employee whose pay was subject to sitoff, *Fuentes* v *Shavin*, 407 U.S. 67 holds that notice must be timely where there has been no notice. Wisdom was presented with a *fait accompli* by HUD.

## CONCLUSION

For the reasons set forth above it is respectfully prayed that a Writ of Certioria be granted to review the judgment of the United States Court of Appeals for the Eighth Circuit herein.

Respectfully Submitted,
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**IN THE UNITED STATES DISTRICT COURT**
**EASTERN DISTRICT OF ARKANSAS**
**PINE BLUFF DIVISION**

GERALD C. WISDOM
V. NO. PB-C-77-4
DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT; DONALD C. ALEXANDER, DIRECTOR OF INTERNAL REVENUE SERVICE; WILLIAM E. SIMON, SECRETARY OF THE TREASURY; CHARLES CASEY AND LEO LANGSTON, JR.; G. WILLIAM MILLER, SECRETARY OF THE TREASURY; AND JEROME KURTZ, COMMISSIONER OF THE INTERNAL REVENUE SERVICE

**MEMORANDUM ORDER**

Pending before the Court is the Defendants' Motion for Partial Summary Judgment to which the plaintiff has replied. In deciding such motion the Court must determine "whether on the basis of the materials presented . . . there is any genuine issue as to any material fact." 6 Moore's Federal Practice §56.02(3) (2d ed.). If there are no genuine material factual controversies on the issues raised, the defendant is entitled as a matter

of law to summary judgment on those issues pursuant Rule 56 of the Federal Rules of Civil Procedure. According to section (e) of that Rule, a party "may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial."

The plaintiff alleges violation of the Privacy Act, 5 U.S.C. §522a[1] and of 42 U.S.C. §§1985 and 1986. Jurisdiction is claimed under 28 U.S.C. §§1331 and 1361, 42 U.S.C. §§1985 and 1986, and 5 U.S.C. §552a. The Court previously granted the federal defendants' Motion to Dismiss. On appeal the case was referred to the Merit System Protection Board (MSPB) for exhaustion of administrative remedies. In so doing, the Court of Appeals declined to rule on the merits of the appeal in its Opinion filed September 20, 1979. On August 15, 1980, the MSPB dismissed the plaintiff's appeal on the basis that, since he had not established that his resignation was involuntary, the Board had no jurisdiction. In August, 1980, the plaintiff filed his Amended Complaint in the Court.

The plaintiff, Gerald Wisdom, was employed by the IRS as a revenue collection officer stationed in Pine Bluff, Arkansas, from January, 1970 until August, 1976. Charles Casey was IRS group manager with responsibility for revenue officers, including Mr. Wisdom, and for compliance with IRS rules. J. Leo Langston, Jr., was chief of the personnel branch for the

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[1]The plaintiff's Complaint alleges violation of §552(a). In light of the §552a, and the Court will use that citation.

This document entered on docket sheet in compliance with Rule 58 and/or 79(a) FRCP on _____ by _____ E. F. Freeman.

Little Rock IRS District and as such, he dealt with any indebtedness problems of employees in his district. Mr. Wisdom was counseled concerning IRS regulations relating to indebtedness by IRS officials in the spring of 1976. On August 3, 1976, the Shreveport Insuring Office, FHA, Department of HUD, sent an unsolicited letter to Mr. Langston concerning the plaintiff's default on a Title I Home Improvement Loan, which debt had been unknown to the IRS officials and unlisted by the plaintiff on the schedule of debts he had submitted to them the previous spring. On August 6, 1976, Casey, Langston and Wisdom met concerning this debt. That same day the plaintiff filled out Standard Form 52, a resignation form. His final salary check and accrued leave payment was sent to his last mailing address on August 23, 1976, and HUD initiated an offset against his retirement fund, which was effectuated. None of these facts have been controverted.

The plaintiff has conceded that no Privacy Act claim may lie against agency officials or individuals but rather that the agency itself is the proper defendant. His Complaint has been amended accordingly. The defendant indicated that there are disputed material facts concerning the plaintiff's allegationns that he is entitled to reinstatement, back pay, and other relief for HUD's violation of 5 U.S.C. §552a. The pending motion does not therefore apply to that issue.

The defendant claims to be entitled to summary judgment on the following issues because as to each there are no material questions of fact:

I. Whether the Privacy Act's provisions apply to the recipient of protected information, here the IRS;

II. Whether the setoff of part of the plaintiff's retirement fund deprived him of due process; and

III. Whether the plaintiff has any cause of action under 42 U.S.C. §1985 and 1986 against any party.

The Court will consider each issue in turn.

I.

The plaintiff does not claim that any IRS or Treasury officials solicited or disclosed improperly any protected information. The defendant IRS does not dispute that it received unsolicited information concerning the plaintiff's defaulted loan from the Shreveport HUD office. Therefore, a legal issue is before the Court, i.e., whether the Privacy Act applied to recipients, here the IRS, of arguably protected information.

Section 552a(b) of Title V states in pertinent part:

> (b) Conditions of disclosure. No agency shall *disclose* any record which is contained in a system of records . . . to another agency, except . . . (emphasis added).

The plain language of the statute forbids disclosure of certain records with stated exceptions. While the Privacy Act does not specifically define the term disclosure, the common sense meaning is the imparting of information which is meaningful and previously unknown to the person to whom the data is imparted. *See, Harper* v. *United States,* 423 F.Supp. 192 (D.C. S.C. 1976); *King* v. *Califano,* 471 F.Supp. 180 (D.C. Colo. 1979). The clear thrust of the statute is that absent written consent of the individual or the existence of specific statutory exceptions, any disclosure of information covered by the Privacy Act is prohibited. *Local 2047, American Federation of Government Employees* v. *Defense General Supply Center,* 423 F.Supp. 481 (D.C. Va. 1976) *aff'd* 573 F.2d 184 (4th Cir. 1976).

The legislative history of the Act reflects a general congressional concern over disclosures of information by the collecting agency to third parties. Analysis of House and Senate Compromise Amendments to the Federal Privacy Act, 120 Cong. Rec. H.12243, 12244 (daily ed. Dec. 18, 1974) and 120 Cong. Red. S.21815, 21816 (daily ed. Dec. 17, 1974).

Judge Heaney discussed the underlying purposes of the Privacy Act in *Voelker* v. *I.R.S.*, 646 F.2d 332 (8th Cir. 1981):

> It is clear that the Act was intended to balance the federal government's need to gather information with the individual's right to privacy. (Citation omitted). It does so by limiting the types of information government may collect, by restricting the means by which the government may gather and store information, and by establishing conditions for the release of information held by the government.

The opinion does not indicate that the Act regulates the reception of protected information or even its use.

A survey of recent cases does not disclose any in which the cause of action was brought against an agency which received and used protected data[2].

In view of the legislative history, plain language of the statute, and pertinent case law, this Court will not broaden the reach of the statute to include the reception of materials covered by the Act. To do so would put

[2]Using the computer, 112 Court of Appeals and District Court decisions were received. In none has the Act been extended to cover reception of information. Many of the cases were based on actions to recover information from government files about the plaintiff, brought pursuant to other subsections of the Act. Those which dealt with §552a(b) discussed prohibited disclosure. *See, e.g., Brown* v. *F.B.I.*, 658 F.2d 71 (2nd Cir. 1981); *Ash* v. *U.S.*, 608 F.2d 178 (5th Cir. 1979); *S.E.C.* v. *Dimensional Entertainment Corp.*, 518 F.Supp. 773 (D. N.Y. 1981.)

every government agency in an untenable position.

The Privacy Act forbids unexempted non-consensual *disclosures*. It is not available as the basis for a suit against an agency which merely *received* information. For that reason, the claim pursuant to 5 U.S.C. §a against the IRS and Department of the Treasury must be dismissed as a matter of law, there remaining no question of material fact relating to this issue.

The plaintiff added in his Memorandum in Opposition to United States' Motion for Summary Judgment another basis for granting relief:

> Count I (based on §552a) . . . invokes this Court's equity jurisdiction and seeks to right a wrong through that jurisdiction by claiming under 28 U.S.C. §1361 this Court's exercise of its equity jurisdiction.

Section 1361 states:

> The district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff.

Injunctive relief, however, is not available under the Privacy Act.

> The injunctive relief sought by the plaintiff is precluded under the Privacy Act by the failure of Congress to provide for such relief. *Cell Associates* v. *National Institutes of Health*, 579 F.2d 1155 (9th Cir. 1978).

*Hanley* v. *Department of Justice*, 623 F.2d 1138 (8th Cir. 1980).

Furthermore, mandamus is available only for non-discriminatory ministerial acts, none of which have been

specifically identified by the plaintiff. Therefore, reliance on 28 U.S.C. §1361 is misplaced.

II.

There is no question that the plaintiff defaulted on his loan made through the Texarkana Oaklawn Bank of Texarkana, Texas, and guaranteed by the Department of Housing and Urban Development. There is not dispute that the amount due and paid by HUD and owed to HUD was $3,304.16. It is undisputed that the plaintiff's need for his retirement fund has not yet arisen. That the plaintiff's final salary check and accrued leave payments were released to him on August 23, 1976, is uncontroverted, as is the fact that HUD initiated a set off against Wisdom's retirement fund, which was effected.

In short, no material factual dispute remain and ruling as a matter of law on the issue, whether the setoff of part of the plaintiff's retirement fund deprived him of due process, is appropriate.

The government possesses clear legal authority to apply all available assets in its possession, including retirement funds belonging the the defaulting employee, to satisfy that employee's debt to the government. This right to set off is grounded in common law. *Gratiot* v. *United States*, 30 U.S. (15 Pet.) 336, 370 (1841). The right is also granted by statute. *See* 5 U.S.C. §5512 (government may withhold pay of employee indebted to it). Collection standards formulated pursuant to the Federal Claims Collection Act of 1966 (31 U.S.C. §952) authorize setoffs of liquidated claims against compensation due federal employees. 4 C.F.R. §102.3 (1976); 4 C.F.R. §102.5 (1976). Specific collection standards incorporating these procedures have been adopted by HUD. 24 C.F.R. §§17.20 - 17.35.

As to the constitutional standard, a long line of cases holds that in certain circumstances, notice and hearing prior to agency action are not required to comport with due process. In *Codd* v. *Velger*, 429 U.S. 624 (1977), a non-tenured policeman who had been dismissed claimed that he was entitled to a hearing due to the stigmatizing effect of certain materials in his personnel file. The Supreme Court held that only if the employer is alleged to have disseminated false information about the employee is a hearing required. The Court stated:

> If the hearing mandated by the Due Process Clause is to serve any useful purpose, there must be some factual dispute between an employer and a discharged employee . . . We believe the absence of any such allegation or finding is fatal to respondent's claim under the Due Process Clause . . .

*Id.* at 627. (Here Mr. Wisdom signed a resignation form).

In this case also there is no dispute about the accuracy of the information disseminated by HUD. Thus any hearing before setoff would be but an exercise in futility since the only valid reason to hold a pre-setoff hearing would be to settle a dispute over the amount due.

Furthermore, application of the standards of *Matthews* v. *Eldridge*, 424 U.S. 319 (1976) would indicate that this is not one of the exceptional cases where a hearing must be afforded to satisfy constitutional standards before the agency can act. The *Eldridge* Court articulated a three-step test to determine the specific requirements of due process in a given situation:

> What is the private interest which would be affected by official action;

> 2. What is the risk of erroneous deprivation of that interest and the probable value of substitute procedures;
>
> 3. What is the Government's interest in the function involved and the financial and administrative burdens probable with alternative methods.

Here the private interest is plaintiff's claim to the money in his retirement annuity fund. His need, however, for retirement funds has not yet arisen. Thus a pre-setoff hearing was not required by imminent need and the failure to afford the plaintiff such hearing did not affect his immediate private interest

Inasmuch as the defaulted loan and the amount thereof are not disputed, there is no risk of an erroeneous determination (and no valid purpose to holding a pre-setoff hearing. *See Codd* v. *Velger, supra.).*

It is obvious that there is a strong governmental interest in pursuing the collection of defaulted loans in an expeditious manner. It has long been held that when an employee no longer works for the government, the United States may, for any obligation owing to it, attach the retirement fund credit of its ex-employee in an amount equal to the arrearage. *See, United States* v. *United States Fidelity and Guar. Co.,* 35 F.Supp. 959 (E.D. Pa. 1940). *See, also, United States* v. *Munsey Trust Co.,* 332 U.S. 234, 239 (1947), in which the Court states:

> The Government has the same right which belongs to every creditor, to apply the unappropriated moneys of his debtor, in his hands, in extinguishment of the debts due to him. (citations omitted).

Withholding sums due to an employee who is separating from government employment to satisfy a

debt to the United States is authorized by 33 Comptroller General 443 (1954). Such validly issued administrative rulings have the force of law and will not be lightly set aside. *California's Commission* v. *United States*, 355 U.S. 534, 542 (1958); *Griss* v. *Duke Power Co.*, 401 U.S. 424, 433 (1971).

Further authority for the administrative offset procedure herein followed may be found in 4 C.F.R. §102.3, which states in pertinent part:

> Collections by offset will be undertaken administratively on claims which are liquidated or certain amounts in every instance in which this is feasible.

The use of administrative setoffs to collect debts due to the United States is one method used in the collection of Title I loans in order to obey the mandate of 31 U.S.C. §952[3]. The ruling in 33 Comptroller General 433, *supra*, is a valid promulgation pursuant to that statute as is 4 C.F.R. §102.3 which is part of the Federal Claims Collection Standards adopted by the General Accounting Office and Department of Justice (*See also* §9214.3 of the Title I Collection Handbook.)

Briefly, then, the United States has certain administrative setoff procedures which are authorized by statute and administrative guidelines. To add to these procedures absent pressing justification would be to slow down collection of defaulted loans and to increase the administrative and financial burden of said collection.

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[3]31 U.S.C. §952. Collection and Compromise (a) The head of an agency or his designate pursuant to regulations prescribed by him and in conformity with such standards as may be promulgated jointly by the Attorney General and the Comptroller General, shall attempt collection of all claims of the United States for money or property arising out of the activities of, or referred to, his agency.

Considering all three *Eldrige* tests, then, this case does not present facts sufficient to come within the category of cases in which prior notice and hearing is required in order to comport with due process requirements[4].

Even were notice and opportunity to respond constitutionally required in this case, the defendant HUD did by letter give Mr. Wisdom notice and an opportunity to respond concerning his debt according to the uncontroverted record.

There are no factual material disputes relating to the setoff of the plaintiff's indebtedness[5]. As a matter of law the Court finds that statutory and constitutional requirements were met and the plaintiff was not denied due process when the claim of the United States in the amount of his defaulted loan was set off and deducted from his retirement fund.

III.

The defendant moves for summary judgment on the issues of whether any of the defendants are liable for violation of 42 U.S.C. §§1985 and 1986.

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[4]*Cf. Atwater* v. *Doudebush*, 452 F.Supp. 622 (N.D. Ill. 1976). The Court did find problems in the process in this case, which is distinguishable on its face and because the recipient was not, as here, given the opportunity to respond prior to the setoff.

[5]In his memorandum the plaintiff's proceedings in bankruptcy are raised. Because the bankruptcy petition was not filed until December 27, 1976, long after Mr. Wisdom received notice from HUD and the events in question had occurred, such allegations are irrelevant herein.

The plaintiff claims that IRS employees, Casey and Langston, conspired against him, forced him to resign his position as a federal officer and in so doing violated 42 U.S.C. §1985(1)[6].

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[6]§1985. Conspiracy to interfere with civil rights (1) Preventing officer from performing duty. If two or more persons in any State or Territory conspire to prevent, by force, intimidation, or threat, any person holding any office, trust, or place of confidence under the United States, or from discharging any duties thereof; or to induce by like means any officer of the United States to leave any State, district or place, where his duties as an officer are required to be performed, or to injure him in his person or property on account of his lawful discharge of the duties of his office, or while engaged in the lawful discharge thereof, or it injure his property so as to molest, interrupt, hinder, or impede him in the discharge of his official duties;

(2) Obstructing justice; intimidating party, witness, or juror. If two or more persons in any State or Territory conspire to deter, by force, intimidation, or threat, any party or witness in any court of the United States from attending such court, or from testifying to any matter pending therein, freely, fully, and truthfully, or to injure such party or witness in his person or property on account of his having so attended or testified, or to influence the verdict, presentment, or indictment of any grand or petit juror in any such court, or to injure the juror in his person or property on account of any verdict, presentment, or indictment lawfully assented to by him, or of his being or having been such juror; or if two or more persons conspire for the purpose of impeding, hindering, obstructing, or defeating, in any manner, the due course of justice in any State or Territory, with intent to deny to any citizen the equal protection of the laws, or to injure him or his property for lawfully enforcing, or attempting to enforce, the right of any person, or class of persons, to the equal protection of the laws;

(3) Depriving persons of rights or privileges. If two or more persons in any State or Territory conspire, or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws, or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice President, or as a member of Congress of the United States; or to injure, any citizen in person or property on account of such support or

He does not claim that there was any racial or class-based animus in their actions, however, or that any other defendants believed him to be a member of a protected class or held any animus based on race or class. Indeed, the Secretaries of HUD and Treasury and the Commissioner of the IRS are not alleged to have any knowledge of this situation at all.

A recent case from the Eighth Circuit Court of Appeals is decisive on this issue as to §1985. In a *per curiam* opinion the Court stated:

> The complaint alleged no racial or class-biased animus; therefore, dismissal of any purported claim under §1985 was proper. *See Jones* v. *United States*, 536 F.2d 269, 271 (8th Cir. 1976), *cert. denied*, 429 U.S. 1039 (1977). *Rachuy* v. *Murphy Motor Freight Lines, Inc.*, 663 F.2d 57 (8th Cir. 1981)[7]. *See, also, Griffin* v. *Breckenridge*, 403 U.S. 88, 192 (1971) (concurring §1985(3) ).

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advocacy; in any case of conspiring set forth therein do, or cause to be undone, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators.

[7]In *Garst* v. *Brown*, 452 F.Supp. 427, 428 (E.D. Va. 1978), a case in which a federal employee brought suit against his superiors individually and in their official capacity alleging they conspired to deprive him of his position y harrassment, the Court found that a complaint against federal officers acting pursuant to federal law, cannot be brought under §§1985 and 1986, where there is no claim or racial or class-biased discrimination distinguishing those sections from general federal tort laws. In this case, the action taken by Casy and Langston was pursuant to the IRS Manual according to their affadavits. *See, also, Stern* v. *United States Gypsum, Inc.*, 547 F.2d 1329, 1344 (7th Cir. 1977) *cert. denied*, 434 U.S. 875 (complaint insufficient to state actionable federal claims if it only alleges

Since the plaintiff makes no racial or class-based allegations, §1985 cannot provide the jurisdictional basis for the claim that he was victim of a conspiracy to force him to resign or to deprive him of equal protection, privileges and immunity. Without a jurisdictional basis, factual questions concerning the circumstances of that resignation, which indeed do exist, are simply immaterial to this §1985 claim[8]. So too are questions which possibly could exist concerning the immunity of the individual indefendants. There is no jurisdiction in this Court to consider those questions[9]; therefore, they are immaterial to decision on this issue.

Claims brought pursuant to §1986 are derivative claims. Necessarily, allegations of violations under §1985 must be proved before there can be any validity to a

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injury resulting from complaints about federal officer's official performance lodged by the defendants with the officer's superiors); *Bethea* v. *Reid*, 445 U.S. 1061 (1971) (federal officer performing duties under color of federal law is not within the terms of §1985); *Moore* v. *Schleslinger*, 384 F.Supp. 163 (D.C. Colo. 1974) (federal officers acting under color of federal laws are immune to suit under §1985(1) ).

[8]In his Memorandum the plaintiff apparently attempts to bring a claim of conspiracy to violate the Privacy Act under §1985. Even were this claim to come within the purview of paragraph (3) this Court has no jurisdiction under that section because there has been no showing of class or racial animus. The controverted occurrences after the alleged illegal disclosure by HUD will, of course, be material when the Privacy Act claim comes to trial on the issue of what, if any, damages resulted from the disclosure. The defendant has not sought summary judgment on that claim.

[9]Both parties discussed the existence or absence of official immunity for the named individual defendants, but the Court's finding that §1985 cannot provide a jurisdictional basis for the plaintiff's claim of conspiracy to cause resignation from and/or to deprive him of equal protection, privileges and immunity, absent racial or class-biased animus, makes decision on that question unnecessary.

claim that a person, who knew of the imminent commission of acts forbidden by §1985, failed to do that within his power to prevent such acts. *Foreman* v. *General Motors Corp.*, 473 F.Supp. 166 (D.C. Mich. 1979); *Shore* v. *Howard*, 414 F.Supp. 379 (D.C.) Tex. 1976). Threre being no jurisdictional basis for a claim pursuant to 42 U.S.C. §1985, there is likewise none under §1986.

As Mr. Justice White stated in *Butz* v. *Economou*, 438 U.S. 478, 507 (1978):

> Unless the complaint states a compensable claim for relief under the Federal Constitution, it should not survive a motion to dismiss.

There is no compensable claim under either §1985 or 1986 against any of the defendants and, failing a jurisdictional basis, the remaining questions of fact are immaterial. Therefore, the motion for summary judgment on all claims brought under §1985 and §1986 is granted.

## CONCLUSION

The Court finds that the only controverted questions of fact material to a claim for which there is jurisdictional basis is whether there was a violation by HUD of the Privacy Act and what damages, if any, flowed from that alleged violation.

It is therefore Ordered that the defendants' Motion for Partial Summary Judgment be, and it hereby is, granted.

It is further Ordered that the claims pursuant to 5 U.S.C. §552a against any individual and against the IRS and the Department of the Treasury be, and they hereby are, dismissed.

All claims pursuant to 28 U.S.C. §1361 are hereby dismissed.

It is further Ordered that the claims against the Department of Housing and Urban Development for deprivation of due process be, and they hereby are, denied as a matter of law.

It is also Ordered that all claims against any defendant predicated on 42 U.S.C. §§1985 and 1986, be, and they hereby are, dismissed for lack of jurisdiction.

Trial of the plaintiff's remaining claim against HUD for violation of 5 U.S.C. §552a is set for Monday, June 21, 1982, at 9:30 a.m. in Pine Bluff, Arkansas.

Oren Harrison
UNITED STATES DISTRICT JUDGE

3 MAY 1982

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS

GERALD WILSON
V. NO. PB-C-77-4
CARLA HILLS, ET. AL.

**FINDING OF FACT AND CONCLUSION OF LAW**

1. The trial of this cause came on with one remaining issue, that is, whether the Department of Housing and Urban Development (HUD), was liable for violation of the Privacy Act, 5 U.S.C. §552a. All other issues had previously been determined by the grant of the defendant's Motion for Partial Summary Judgment pursuant to Rule 56 of the Federal Rule of Civil Procedure. There is, of course, no individual liability under the Privacy Act.

2. Jurisdiction is predicated on 5 U.S.C. §552a and plaintiff's standing is not disputed.

3. The Court need not undertake a procedural review since it is a matter of record, or a summary of the facts, inasmuch as they are clear and very little factual dispute exists.

4. On one matter the Court must make a credibility finding, since Mr. Wisdom, plaintiff, claims that in the August 6, 1976 meeting with Charles Casey and J. Leo Langston, his supervisor at personnel offices at the Internal Revenue Service (IRS), Mr. Casey threatened him to force his resignation. Casey and Langston deny that any threats were made. The Court finds that the conclusion of Hearing Officer after the Merit Systems Review Board Hearing was correct; this Court also credits the testimony of Casey and Langston and accepts their statements that no threats were made.

5. Mr. Wisdom did indeed find himself in an

unfortunate situation, for which one must have compassion. But the government cannot be blamed for Mr. Wisdom's bad financial condition. The evidence showed that the plaintiff had been laterally transferred to Texarkana where he purchased a home and applied for loans. Exhibit No. 8 shows that as early as September, 1974, there was delinquency in payment. Then Bank's series of letters indicate a continuing problem. Wisdom testified that the bank notified him it was turning his note over to HUD, so he clearly knew he had a debt problem. Exhibit No. 16 showed that he knew the rules and therefore he knew that such debt problems were viewed seriously by IRS management. It is also clear from the testimony that since these events, Mr. Wisdom has done well in governmental service.

6. In the final analysis, it is the application of the Act to the situation which is important. In *Bruce* v. *United States*, 621 F.2d 914 (8th Cir. 1980). The Court of Appeals has ruled in a similar situation, although not concerning the same agency. In *Bruce*, General Services Administration (GSA) released records pursuant to a subpoena where there were no contrary regulations. Such release, the Court stated, could not be considered an intentional or willful violation of the Act and, accordingly, the claim for damages under the Privacy Act would fail. The evidence here showed that the Department of Housing and Urban Development had certain collection regulations and procedures for Title I loans which its agent considered to be required and which she tried to follow. The Federal Claims Collection Act and regulations pursuant thereto, required certain of these procedures. The facts showed conclusively that HUD's Title I Officer was following presumptively valid regulations and statutes when she sent the challenged letter. The Court cannot, given these

circumstances, conclude that the sending of the letter from HUD to Mr. Wisdom's employer as required by regulations was an intentional and willful violation of the Act.

7. Having found that there was no intentional or willful action by HUD under the standards of *Bruce*, the Court further finds that the plaintiff's claim for damages pursuant to the Privacy Act must fail. The motion to dismiss by counsel for the government will be granted.

UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS

GERALD C. WISDOM

V. NO. PB-C-77-4

CARLA A. HILLS, Sec. of HUD

**ORDER**

This action came on to be tried before the Court, and the evidence adduced by the parties having been heard, and the Court having made its findings of fact and conclusions of law, it is ORDERED AND ADJUDGED that the complaint herein be and it is hereby dismissed, each party to bear own costs.

The Clerk of the Court is directed to enter judgment pursuant to Rule 79(a), Federal Rules of Civil Procedure.

UNITED STATES DISTRICT JUDGE

5 USC §552a(b) No agency shall disclose any record which is contained in a system of records by any means of communication to any person, or to another agency, except pursuant to a written request by, or with the prior written consent of, the individual to whom the record pertains, unless disclosure of the record would be —

(1) to those officers and employees of the agency which maintains the record who have a need for the record in the performance of their dutues;

(2) required under section 552 of this title (5 USCS § 552);

(3) for a routine use as defined in subsection (a)(7) of this section and described under subsection (e)(4)(D) of this section;

(4) to the Bureau of the Census for purposes of planning or carrying out a census or survey or related activity pursuant to the provisions of title 13 (13 USCS §§ 1 et seq.);

(5) to a recipient who has provided the agency with advance adequate written assurance that the record will be used solely as a statistical research or reporting record, and the record is to be transferred in a form that is not individually identifiable;

(6) to the National Archives of the United States as a record which has sufficient historical or other value to warrant its continued preservation by the United States Government, or for evaluation by the Administrator of General Services or his designee to determine whether the record has such value;

(7) to another agency or to an instrumentality of any governmental jurisdiction within or under the control of the United States for a civil or criminal law enforcement activity if the activity is authorized by law, and if the head of the agency or instrumentality has made a written request to the agency which maintains the record specifying the particular portion

desired and the law enforcement activity for which the record is sought;

(8) to a person pursuant to a showing of compelling circumstances affecting the health or safety of an individual if upon such disclosure notification is transmitted to the last known address of such individual;

(9) to either House of Congress, or, to the extent of matter within its jurisdiction, any committee or subcommittee thereof, any joint committee of Congress or subcommittee of any such joint committee;

(10) to the Comptroller General, or any of his authorized representatives, in the course of the performance of the duties of the General Accounting Office; or

(11) pursuant to the order of a court of competent jurisdiction.

(e) Agency Requirements. Each agency that maintains a system of records shall —

(1) maintain in its records only such information about an individual as is relevant and necessary to accomplish a purpose of the agency required to be accomplished by statute or by executive order of the President;

(2) collect information to the greatest extent practicable directly from the subject individual when the information may result in adverse determinations about an individual's rights, benefits, and privileges under Federal programs;

(3) inform each individual whom it asks to supply information, on the form which it uses to collect the information or on a separate form that can be retained by the individual —

(A) the authority (whether granted by statute, or by executive order of the President) which authorizes

the solicitation of the information and whether disclosure of such information is mandatory or voluntary;

(B) the principal purpose or purposes for which the information is intended to be used;

(C) the routine uses which may be made of the information, as published pursuant to paragraph (4) (D) of this subsection; and

(D) the effects on him, if any, of not providing all or any party of the requested information;

(4) subject to the provisions of paragraph (11) of this subsection, publish in the Federal Register at least annually a notice of the existence and character of the system of records, which notice shall include —

(A) the name and location of the system;

(B) the categories of individuals on whom records are maintained in the system;

(C) the categories of records maintained in the system;

(D) each routine use of the records contained in the system, including the categories of users and the purpose of such use;

(E) the policies and practices of the agency regarding storage, retrievability, access controls, retention, and disposal of the records;

(F) the title and business address of the agency official who is responsible for the system of records;

(G) the agency procedures whereby an individual can be notified at his request if the system of records contains a record pertaining to him;

(H) the agency procedures whereby an individual can be notified at his request how he can gain access to any record pertaining to him contained in the system of records, and how he can contest its content; and

(I) the categories of sources or records in the

system;

(5) maintain all records which are used by the agency in making any determination about any individual with such accuracy, relevance, timeliness, and completeness as is reasonably necessary to assure fairness to the individual in the determination;

(6) prior to disseminating any record about an individual to any person other than an agency, unless the dissemination is made pursuant to subsection (b)(2) of this section, make reasonable efforts to assure that such records are accurate, complete, timely, and relevant for agency purposes;

(7) maintain no record describing how any individual exercises rights guaranteed by the First Amendment unless expressly authorized by statute or by the individual about whom the record is maintained or unless pertinent to and within the scope of an authorized law enforcement activity;

(8) make reasonable efforts to serve notice on an individual when any record on such individual is made available to any person under compulsory legal process when such process becomes a matter of public record;

(9) establish rules of conduct for persons involved in the design, development, operation, or maintenance of any system of records, or in maintaining any record, and instruct each such person with respect to such rules and the requirements of this section, including any other penalties for noncompliance;

(10) establish appropriate administrative, technical, and physical safeguards to insure the security and confidentiality of records and to protect against any anticipated threats or hazards to their security or integrity which could result in substantial harm, embarrassment, inconvenience, or unfairness to any individual on whom information is maintained; and

(11) at least 30 days prior to publication of information under paragraph (4)(D) of this subsection, publish in the Federal Register notice of any new use or intended use of the information in the system, and provide an opportunity for interested persons to submit written data, views, or arguments to the agency.

(g)(1) Civil Remedies. Whenever any agency —

(A) makes a determination under subsection (d)(3) of this section not to amend an individual's record in accordance with his request, or fails to make such review in conformity with that subsection;

(B) refuses to comply with an individual request under subsection (d)(1) of this section;

(C) fails to maintain any record concerning any individual with such accuracy, relevance, timeliness, and completeness as is necessary to assure fairness in any determination relating to the qualifications, character, rights, or opportunities of, or benefits to the individual that may be made on the basis of such record, and consequently a determination is made which is adverse to the individual; or

(D) fails to comply with any other provision of this section, or any rule promulgated thereunder, in such a way as to have an adverse effect on any individual,

the individual may bring a civil action against the agency, and the district courts of the United States shall have jurisdiction in the matters under the provisions of this subsection.

(2)(A) In any suit brought under the provisions of subsection (g)(1)(A) of this section, the court may order the agency to amend the individual's record in accordance with his request or in such other way as the court may direct. In such a case the court shall determine the matter de novo.

(B) The court may assess against the United States

reasonable attorney fees and other litigation costs reasonably incurred in any case under the paragraph in which the complainant has substantially prevailed.

(3)(A) In any suit brought under the provisions of subsection (g)(1)(B) of this section, the court may enjoin the agency from withholding the records and order the production to the complainant of any agency records improperly withheld from him. In such a case the court shall determine the matter de novo, and may examine the contents of any agency records in camera to determine whether the records or any portion thereof may be withheld under any of the exemptions set forth in subsection (k) of this section, and the burden is on the agency to sustain its action.

(B) The court may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under this paragraph in which the complainant has substantially prevailed.

(4) In any suit brought under the provisions of subsection (g)(1)(C) or (D) of this section in which the court determines that the agency acted in a manner which was intentional or willful, the United States shall be liable to the individual in an amount equal to the sum of —

(A) actual damages sustained by the individual as a result of the refusal or failure, but in no case shall a person entitled to recovery receive less than the sum of $1,000; and

(B) the costs of the action together with reasonable attorney fees as determined by the court.

(5) An action to enforce any liability created under this section may be brought in the district court of the United States in the district in which the complaint resides, or has his principal place of business, or which the agency records are situated, or in the District of

without regard to the amount in controversy, within two years from the date on which the cause of action arises, except that where an agency has materially and willfully misrepresented any information required under this section to be disclosed to an individual and the information so misrepresented is material to establishment of the liability of the agency to the individual under this section, the action may be brought at any time within two years after discovery by the individual of the misrepresentation. Nothing in this section shall be construed to authorize any civil action by reason of any injury sustained as the result of disclosure of a record prior to September 27, 1975.

PUBLIC LAW 94—183
94th Congress

An Act

To amend chapter 83 of Title 5, United States Code, to establish time limitations in applying for civil service retirement benefits, and for other purposes.

Dec. 31, 1975
(H.R. 4573)

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That section 8345 of title 5, United States Code, is amended by adding the following new subsection at the end thereof:

Civil service retirement benefits.
Applications, time limitations.

"(h)(1) No payment shall be made from the Fund unless an application for benefits based on the service of an employee or Member is received in the Civil Service Commission before the one hundred and fifteenth anniversary of his birth.

"(2) Notwithstanding paragraph (1) of this subsection, after the death of an employee, Member, or annuitant, no benefit based on his service shall be paid from the Fund unless an application therefor is received in the Civil Service Commission within 30 years after the death or other event which gives rise to title to the benefit".

Sec. 2. Title 5, United States Code, is amended as follows:

(1) In section 302(b)(2) strike out "324" and insert "3702" in place thereof;

(2) In section 552a(g)(5) strike out "to the effective date of this section" and insert in lieu thereof "to September 27, 1975";

(3) In section 2902(b) strike out "the Postmaster General,";

(4) In section 3351 strike out ", except an appointment made under section 3311 of title 39";

(5) In section 3363 strike out ", except an appointment made under section 3311 of title 39";

(6) Strike out section 3364; Repeal.

(7) In the analysis of chapter 33 strike out item 3364;

(8) In section 3501(b) strike out ", except an employee whose appointment is made under section 3311 to title 39";

(9) In section 3581(5)(A) strike out "3582(a)" and insert "3582(b)" in place thereof;

(10) In the last sentence of section 3582(b) strike out "on or after the date off enactment of the Foreign Assistance Act of 1969" and insert "after December 29, 1969" in place thereof;

(11) In section 4102(a)(2)(B) strike out "(except a Postmaster)";

(12) In section 5102(c)(5) strike out "White House Police" and insert "Executive Protective Service" in place thereof;

(13) In section 5102(c)(9) strike out "40" and insert "305" in place thereof;

(14) In section 5108(c)(11) strike out "twenty two" and insert in lieu thereof "twenty-five";

(15) In section 5108(c) redesignate paragraphs (11) through (14) as paragraphs (11) throught (16), respectively;

(16) In section 5303(c) strike out "and section 3552 of title 39";

(17) In section 5314 redesignate paragraphs (53) through (61) as paragraphs (53) through (63), respectively;

(18) In section 5315 redesignate paragraphs (91) through (104) as paragraphs (91) through (107), respectively;

**4CFR §102.2 Demand for payment.**

Appropriate written demands shall be made upon a debtor of the United States in terms which inform the debtor of the consequences of his failure to cooperate. Three written demands, at 30-day intervals, will normally be made unless a response to the first or second demand indicates that further demand would be futile or unless prompt suit or attachment is required in anticipation of the departure of the debtor or debtors from the jurisdiction or his or their removal or transfer of assets, or the running of the statute of limitations. There should be no undue time lag in responding to any communication received from the debtor or debtors.

**§102.5 Contact with debtor's employing agency**

When a debtor is employed by the Federal Government or is a member of the military establishment or the Coast Guard, and collection by offset cannot be accomplished in accordance with 5 U.S.C. 5514, the employing agency will be contacted for the purpose of arranging with the debtor for payment of the indebtedness by allotment or otherwise in accordance with section 205 of Executive Order 11222 of May 8, 1965, 3 CFR, 1965 Supp., p. 130 (30 F.R. 6469).

**24 CFR §17.20 Scope; definitions;**

(a) *Scope.* This subpart sets forth the regulations of the Secretary of Housing and Urban Development implementing the Federal Claims Collection Act of 1966 (the Act), in conformity with the standards jointly promulgated by the Attorney General and the Comptroller General in 4 CFR Parts 101 through 105. The Act (1) requires the Secretary or his designee to attempt collection of all claims of the United States for money or property arising out of the activities of the

Department; and (2) authorizes the Secretary or his designee to compromise such claims that do not exceed $20,000 exclusive of interest, or to suspend or terminate collection action where it appears that no person liable on such claim has the present or prospetive financial ability to pay any significant sum thereon or that the cost of collecting such claim is likely to exceed the amount of recovery.

(b) *Definitions.* For purposes of this subpart, "office" means the organization of each Assistant Secretary; the Federal ment National Mortgage Association; the Insurance Administration; the Govern-Community Development Corporation; the New Communities Administration; the Federal Disaster Assistance Administration; the Office of Interstate Land Sales Registration and each Regional, Area, and Insuring Office of the Department.

(42U.S.C. 3535(d)) (36 FR 24427, Dec. 22, 1971, as amended at 40 FR 28599, July 7, 1975)

**§17.21 Incorporation of joint standards by reference.**

All administrative actions to collect claims arising out of the activities of the Department shall be performed in accordance with the applicable standards prescribed in 4 CFR parts 101 through 105, which are incorporated by reference and supplemented in this subpart.

**§17.22 Subdivision and joining of claims.**

(a) A debtor's liability arising from a particular transaction or contract shall be considered as a single claim in determining whether the claim is one not exceeding $20,000 exclusive of interest for the purpose of compromise or termination of collection action. Such a claim may not be subdivided to avoid the monetary ceiling established by the Act.

(b) Joining of two or more single claims in a

demand upon a particular debtor for payment totaling more than $20,000 does not preclude compromise or termination of collection action with respect to any one of such claims that does not exceed $20,000 exclusive of interest.

**§17.23 Authority of offices to attempt; collection of claims.**

The head of each office shall designate a claims collection officer, who shall attempt to collect in full all claims of the Department for money or property arising out of the activities of such office. Each claims collection officer shall establish and currently maintain a file with regard to each claim for which collection activities are undertaken.

(42 U.S.C. 3535(d) ) (40 FR 28599, July 7, 1975)

**§17.24 Referral of claims to the Assistant Secretary for Administration.**

(a) *Authority of the Assistant Secretary for Administration.* The Assistant Secretary for Administration shall exercise the powers and perform the duties of the Secretary to compromise, or to suspend or terminate collection action on, all Department claims not exceeding $20,000 exclusive of interest, except as provided in §17.25 and paragraph (b) of this section. When initial attempts at collection by the office having responsibility for such claims have not been fully successful, the claim file shall be forwarded to the Assistant Secretary for Administration for further administrative collection procedures. Claims shall be referred to the Assistant Secretary for Administration well within the applicable statute of limitations (28 U.S.C. 2415 and 2416), but in no event more than 2 years after the claims accrued.

(b) *Exclusions.* There shall be no compromised or terminated collection action with respect to any claim: (1) As to which there is an indication of fraud, the presentation of a false claim, or misrepresentation on the part of the debtor or any other party having an interest in the claim; (2) based in whole or in part on conduct in violation of the antitrust laws: (3) based on tax statutes; or (4) arising from an exception made by the General Accounting Office in the account of an accountable officer. Such claims shall be promptly referred to the Justice Department or GAO, as appropriate.

(42 U.S.CC. 3535(d) )

**§17.25 Authority of offices to compromise claims or suspend or terminate collection action.**

(a) *Small claims.* Where it appears that the cost of collecting a claim of less than $400 will exceed the amount of recovery, the claims collection officer is authorized to compromise the claim or to terminate collection action.

(b) *Claims arising under certain programs.* The office primarily responsible for the following programs of the Department is authorized, in those cases where initial collection attempts are not wholly successful, to compromise or to suspend or terminate collection action on claims not exceeding $20,000 with respect to:

(1) A claim on a property improvement loan account under title I of the National Housing Act;

(2) A claim on a rehabilitation loan account under section 312 of the Housing Act of 1964;

(3) A claim against tenants or former tenants of properties acquired by, or under the custody of, the Secretary or held by him as mortgagee in possession; or

(4) A claim arising out of the operational (nonadministrative) activities of the Government National Mortgage Association (GNMA).

However, no office shall undertake to compromise or terminate any collection action excluded under §17.24(b).

**§17.26 Department claims officer.**

The Assistant Secretary for Administration shall designate a subordinate official as Department Claims Officer, who shall be responsible for the establishment and maintenance of procedures within the Department relating to the collection of claims and the co-ordination of all collection activities in all Department offices.
(42 U.S.C. 3535(d) ) (40 FR 28599, July 7, 1975)

**§17.27 Claims files.**

Each claims collection officer is responsible for obtaining current credit data about each person against whom a claim is pending in his office. The file shall be kept reasonably up to date by the Department Claims Officer for claims referred to the Assistant Secretary for Administration for collection. Such credit data may take the form of (a) a commercial credit report, (b) an agency investigative report showing the debtor's assets and liabilities and his income and expenses, (c) the individual debtor's own financial statement executed under penalty of perjury reflecting his assets and liabilities and his income and expenses, or (d) an audited balance sheet of a corporate debtor. The file should also contain a checklist or brief summary of actions taken to collect or comprise a claim.
(42 U.S.C. 3535(b) )

**§17.28 Monthly report of collection action.**

The Department Claims Officer shall make a monthly report to the Assistant Secretary for Administration and all offices that have referred claims for collection. The report should contain the following

information as a minimum:

(a) All outstanding claims referred to the Assistant Secretary for Administration for administrative collection, including the name and address of the debtor, the amount of the claim, the date the claim accrued, the basis of the claim the office referring the claim, and the current progress of collection activities.

(b) All claims compromised or on which collection has been suspended or terminated or referred to GAO or Justice for further collection action during the month. The collection action taken and the basis for the action should be indicated.

(c) All claims referred to the Department of Justice under §17.24(a).

(d) Claims returned to this Department by the Justice Department for further collection action because Justice's handling was not warranted.

(42 U.S.C. 3535(b) )

**§17.29 Accounting control**

Each office and the Department Claims Officer shall process all claims collections through the appropriate accounting office and report the collection, compromise, suspension and termination of all claims to the appropriate accounting office for recording.

**§Record retention.**

The file of each claim on which administrative collection action has been completed shall be retained by the appropriate office or the Assistant Secretary for Administration not less than 1 year after the applicable statute of limitations has run.

(42 U.S.C. 3535(b) )

**§17.31 Suspension or revocation of eligibility.**

(a) Where a contractor, grantee, or other participant in programs sponsored by the Department fails to pay his debts to the Department within a reasonable time after demand, the fact shall be reported by the Assistant Secretary for Administration to the Inspector General, who shall place such defaulting participant's name on the Department's list of debarred, suspended and ineligible contractors and grantees and the participant will be so advised.

(b) The failure of any surety to honor its obligations in accordance with 6 U.S.C 11 is to be reported at once to the Assistant Secretary for Administration who shall so advise the Treasury Department. The Treasury Department will notify this Department when a surety's certificate of authority to do business with the Government has been revoked or forfeited.

(42 U.S.C. 3535(b) )

**§Standards for collection of claims.**

(a) *Demand for payment.* Appropriate written demands shall be made upon the debtor which shall include information relating to the consequences of his failure to cooperate.

(b) *Collection by offset.* Collection by offset will be administratively undertaken on claims which are liquidated or certain in amount in every instance where this is feasible.

(c) *Liquidation of collateral.* Where the Department holds security or collateral that may be liquidated and the proceeds applied on debts due it through the exercise of a power of sale in the security instrument or a nonjudicial foreclosure, such procedures should be followed if the debtor fails to pay his debt within a reasonable time after demand, unless the cost of disposing of the collateral will be disproportionate to its value or special circumstances require judicial

foreclosure.

(d) *Collection in installments.* Claims with accrued interest should be collected in full in one lump sum whenever this is possible. However, if the debtor is financially unable to pay the indebtedness in one lump sum, payment may be accepted in regular installments.

(e) *Interest.* Where prejudgment interest is not mandated by statute, contract or regulation, the interest shall be assessed at 7 percent. Prejudgment interest may be waived as an inducement to voluntary payment. In such cases demand letters should inform the debtor that prejudgment interest will be collected if suit becomes necessary. When a debt is paid in installments and interest is collected, installment payments will first be applied to the payment of accrued interest and then to principal in accordance with the so-called "U.S. Rule" unless a different rule is prescribed by statute, contract or regulation. Prejudgment interest shall not be demanded or collected on civil penalty and forfeiture claims unless the statute under which the claim arises authorizes the collection of such interest.

(f) *Omission not a defense.* Failure to comply with any standard prescribed in 4 CFR Chapter II or in this subpart shall not be available as a defense to any debtor.

**§Standards for compromise of claims.**

(a) *Compromise offer.* An offer to compromise may be accepted (1) if there is real doubt concerning the Department's ability to prove its case in court for the full amount claimed; (2) if the cost of collecting the claim does not justify the enforced collection of the full amount; (3) if in connection with statutory penalties of forfeitures established as an aid to enforcement and to complete compliance, the Department's enforcement policy will be adequately served by acceptance of the Assistant Secretary for Administration (or other designee)

and made a part of the claim record.

(b) *Documentary evidence of compromise.* No compromise of a claim shall be final or binding on the Department unless it is in writing and signed by the appropriate officer who has authority to compromise the claim pursuant to this subpart.

(42 U.S.C. 3535(b) )

**§Standards for suspension or termination of collection action.**

(a) *Suspension of collection action.* Collection action shall be suspended temporarily on a claim when the debtor cannot be located after diligent effort but there is reason to believe that future collection action may be sufficiently productive to justify periodic review and action on the claim, having consideration for its size and the amount which may be realized. Collection action may be suspended temporarily on a claim when the debtor owns no substantial equity in realty and is presently unable to make payment on the Department's claim or effect a compromise, but his future prospects justify retention of the claim for periodic review and action and (1) the applicable statute of limitations has been tolled or started anew or (2) future collection can be effected by offset notwithstanding the statute of limitations. Suspension as to a particular debtor should not defer the early liquidation of security for the debt.

(b) *Termination of collection action.* Collection action may be terminated and the Department file closed for the following reasons: (1) No substantial amount can be collected; (2) the debtor cannot be located; (3) the cost will exceed recovery; (4) the claim is legally without merit; or (5) the claim cannot be substantiated by evidence.

**§17.35 Referral to GAO or Justice Department.**

(a) *Claims referred.* Claims which cannot be collected, compromised, or terminated in accordance with 4 CFR Parts 101 to 105 will be referred to the General Accounting Office in accordance with 31 U.S.C. 71 or to the Department of Justice if this Department has been granted an exception from referrals to the General Accounting Office. Also, if there is doubt as to whether collection action should be suspended or terminated on a claim, the claim may be referred to the General Accounting Office for advice. When recovery of a judgment is prerequisite to imposition of administrative sanctions, the claim may be referred to the Justice Department for litigation even though termination of collection activity might otherwise be considered.

(b) *Prompt referral.* Such referrals shall be made as early as possible consistent with aggressive collection action, and in any event, well within the statute of limitations for bringing suit against the debtor.

# Supplemental Appendix

Office - Supreme Court, U.S.
FILED
NOV 2 1983
ALEXANDER L. STEVAS,
CLERK

No. 83-673

IN THE

# Supreme Court of the United States of America

OCTOBER 1983 TERM

GERALD WISDOM
*Petitioner*
v.
Department of Housing and Urban Development, Donald C. Alexander, Director of IRS, William E. Simon, Secretary of Treasury, Charles Casey, J. Leo Langston, Jr., G. William Miller and Jerome Kirtz
*Respondants*

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

## SUPPLEMENTAL APPENDIX

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**Opinion of**
**United States Court of Appeals**
FOR THE EIGHTH CIRCUIT

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NO. 82-1981

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Gerald C. Wisdom,
Appellant,
v.
Department of Housing and Urban Development, Donald C. Alexander, Director of IRS, William E. Simon, Secretary of Treasury, Charles Casey, J. Leo Langston, Jr., G. William Miller and Jerome Kirtz,
Appellees.

Appeal from the United States District Court for the Eastern District of Arkansas

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Submitted: April 14, 1983
Filed: August 10, 1983

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Before LAY, Chief Judge, McMILLAN and JOHN R. GIBSON, Circuit Judges.

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McMILLAN, Circuit Judge.

Plaintiff-appellant Gerald Wisdom, a former employee of the Internal Revenue Service (IRS), brought this action

against two former IRS supervisors and the Department of Housing and Urban Development (HUD). He asserted that his former supervisors violated 42 U.S.C. § 1985(a) when they conspired to force him to resign. He further alleged that HUD violated his due process rights when it used funds in his retirement account to pay off a defaulted loan and that HUD violated the Privacy Act when it released information on the defaulted loan to Wisdom's employer. The district court[1] granted motions for summary judgement in favor of Casey and Langston on the § 1985(1) claim and HUD on the due process claim. After trial, the district court found for HUD on the Privacy Act claim. For the reasons discussed below, we affirm the district court's judgment in favor of HUD on the Privacy Act claim and the due process claim; we reverse the summary judgment in favor of Casey and Langston on the § 1985(1) claim and remand for further proceedings.

Wisdom was employed by the IRS as a revenue collector in Pine Bluff, Arkansas. In the mid-1970's Wisdom began having financial difficulties. His superiors at the IRS office gave advice and helped Wisdom set up a payment schedule to pay off all his debts.

In 1973, Wisdom borrowed $5,000 from the Texarkana Oaklawn Bank. The loan was guaranteed by HUD. In 1976, Wisdom defaulted on the loan, and HUD paid it off. On August 3, 1976, a HUD official sent a letter to Langston, the IRS Chief of Personnel in Little Rock, concerning Wisdom's default. Langston discussed the letter with Casey, and IRS group manager, and the two met with Wisdom on August 6. During the meeting Wisdom offered his resignation, and HUD initiated statutory "setoff" proceedings to recover the

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[1]The Honorable Oren Harris, United States Senior District Judge for the Eastern District of Arkansas.

loan amount from Wisdom's retirement account, which became available for that purpose on Wisdom's resignation. Wisdom was not given a hearing before the setoff was allowed.

Wisdom filed a complaint against HUD, Langston, and Casey, alleging that HUD violated the Privacy Act when it notified Langston of the defaulted loan, that Langston and Casey conspired to force his resignation in violation of 42 U.S.C. § 1985(1), and that HUD violated his due process rights when it deprived him of funds in his retirement account without a predeprivation hearing. We will consider each argument in turn.

I. Privacy Act

The Privacy Act prohibits disclosure of any records on an individual without the individual's consent. 5 U.S.C. § 552a(b). There are exceptions, but none apply in this case. However, a violation of the Act alone is not enough for Wisdom to recover damages; he must show that the violation had an adverse impact on him, id. § 552a(g)(1)(D), and that the agency acted intentionally or willfully. *Id.* § 552a(g)(4).

The district court relied on *Bruce v. United States*, 621 F.2d 914 (8th Cir. 1980), to find that HUD's violation was not willful. In *Bruce*, this court held that where records were released in accordance with regulations the validity of which had not been questioned, there was no "intentional" violation of the Privacy Act. 621 F.2d at 617.

In this case HUD released the information to the IRS in compliance with the guidelines under the Title I Collection Handbook, which implemented the Federal Claims Collection Act, 31 U.S.C. §3701.[2] Nothing in the record

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[2]At the time of the collection activities, this Act was codified at 31 U.S.C. § 951 *et seq*. Extensive changes have since been made in the Act. Pub. L. No. 97-452, 96 Stat. 2470, 2474 (1983).

indicates that the Handbook's guidelines have been questioned or challenged. However, Wisdom contends that HUD's failure to revise the Handbook in light of the Privacy Act diminishes the deference due to HUD's use of the Handbook. To a certain extent we agree. HUD certainly could not ignore the dictates of the Privacy Act in promulgating regulations, and the Act does require that agencies establish procedures guaranteeing confidentiality and accuracy of records. 5 U.S.C. § 522a(e). Thus, in some circumstances, the existence of regulations may not shield an agency from liability. However, here we do not consider that HUD's continued reliance on its Collection Handbook can be characterized as a willful violation of the Act. The Privacy Act was still relatively recently enacted and its ramifications not perfectly clear; the particular provision at issue here had not been challenged; nor can it be characterized as so patently egregious and unlawful that anyone applying them should have known they were unlawful. Therefore, we conclude that the district court did not err in applying *Bruce* to this case.

II. Due Process

Wisdom alleges that HUD's failure to provide him with a hearing before it applied funds in his retirement account to pay off his defaulted loan violated his right to due process. He relies on *Sniadach v. Family Finance Corp.*, 395 U.S. 337 (1969), and other cases involving seizure by creditors of the property of debtors.

Clearly due process does not mandate a prior hearing in this case. The deprivation was of property neither then available to Wisdom nor being used by him for necessities of life. *Cf. Atwater v. Roudebush*, 452 F. Supp. 622, 631 (N.D. Ill. 1976). Thus, even if the deprivation in this case had been wrongful, no harm would have resulted from a

postdeprivation hearing rather than before. *Mathews v. Eldridge*, 424 U.S. 319 (1976). Finally, Wisdom neither disputes the amount of the debt nor that he owes it. Thus, no facts exist which, if shown, would have prevented setoff. *See Codd v. Velger*, 429 U.S. 624 (1977).

Wisdom asserts that he was harmed by the absence of a pre-setoff hearing because he was given no change to set up a payment schedule with the government.[3] There is no constitutional requirement that debtors be allowed to negotiate settlements on debts owed to the government.

III. Section 1985(1)

Section 1985(1)[4] prohibits conspiracy to prevent a federal officer from performing his duty. 42 U.S.C. § 1985(1). Wisdom alleged that when Casey and Langston met with him after receiving the letter from HUD, they coerced him into resigning in violation of that section. The district court dismissed on the basis that Wisdom had alleged no racial or

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[3]When Congress amended the Federal Claims Collection Act in 1983, it added a provision requiring more extensive notice and granting other rights to a debtor whose property is taken by administrative setoff. 31 U.S.C. § 3716; *see* note 2 *supra*.

[4]Section 1985 provides in pertinent part:

> (1) If two or more persons in any State or Territory conspire to prevent, by force, intimidation, or threat, any person from accepting or holding any office, trust, or place of confidence under the United States, or from discharging any duties thereof; or to induce by like means any officer of the United States to leave any State, district, or place, where his duties as an officer are required to be performed, or to injure him in his person or property on account of his lawful discharge of the duties of his office, or while engaged in the lawful discharge thereof, or to injure his property so as to molest, interrupt, hinder, or impede him in the discharge of his official duties; . . . the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators.

class-based discrimination; the court relied on *Jones v. United States*, 536 F.2d 269 (8th Cir. 1976), *cert. denied*, 429 U.S. 1039 (1977), in which this court held in dictum that an allegation of racial or class-based discrimination is required to state a claim under any subsection of § 1985. 536 F.2d at 271. For the reasons discussed below, we reverse the dismissal of appellant's § 1985 claim.

*Jones* has been seriously undermined by the Supreme Court's recent decision in *Kush v. Rutledge*, 103 S. Ct. 1483 (1983). The plaintiff in *Kush* filed suit under the first part of § 1985(2) which prohibits conspiracy to intimidate witnesses; there was no allegation of racial or class-based discriminatory animus. The Court held that an allegation of discriminatory animus was not required to state a cause of action under the first part of § 1985(2). *Id.* at 1488. The Court noted that § 1985 proscribes five kinds of conspiracies that interfere with:

> (a) the performance of official duties by federal officers; (b) the administration of justice in federal courts; (c) the administration of justice in state courts; (d) the private enjoyment of "equal protection of the laws" and "equal privileges and immunities under the laws"; and (e) the right to support candidates in federal elections.

*Id.* at 1487. The Court went on to find

> [t]hree of the five broad categories, the first two and the fifth, related to institutions and processes of the federal government — federal officers, § 1985(1); federal judicial proceedings, the first portion of § 1985(2); and federal elections, the second part of § 1985(3). The statutory provisions dealing with these categories of conspiratorial activity contain no language requiring that the conspirators act with intent to deprive their victims of the equal protection of the laws.

*Id.*

We consider *Kush* to apply to § 1985(1) as well as to the first part of § 1985(2) and believe that *Kush* has effectively overruled our decision in *Jones*. *Kush* specifically noted that § 1985(1) did not contain language requiring intent to deprive victims of equal protection rights; the absence of that language in the first part of § 1985(2) was deemed of "greatest importance" to the court's holding that class-based animus was not required to violate that provision. *Id.* at 1487-88. Thus, *Kush* mandates a holding that a cause of action under § 1985(1) does not require an allegation of racial or class-based discriminatory animus.

Defendant-appellees argue that even if *Kush* is interpreted to mean that an allegation of class-based animus is not required, there are other grounds for upholding the dismissal of Wisdom's § 1985(1) claim. Specifically, appellees claim that they are immune and that there is no allegation of interference with official duties. Appellees urge that because these are questions of law, this court should decide them without remand. We consider it more appropriate for the district court to answer these questions first, after such further proceedings as the district court deems necessary.

Accordingly, the judgment of the district court is affirmed in part and reversed in part and remanded for further proceedings.

A true copy.

ATTEST:
CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT

# Opposition

Supreme Court, U.S.
FILED
JAN 16 1984
ALEXANDER L. STEVAS
CLERK

No. 83-673

# In the Supreme Court of the United States

OCTOBER TERM, 1983

GERALD WISDOM, PETITIONER

*v.*

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, ET AL.

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT*

## MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

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*Washington, D.C. 20530*
*(202) 633-2217*

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# In the Supreme Court of the United States

OCTOBER TERM, 1983

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No. 83-673

GERALD WISDOM, PETITIONER

*v.*

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, ET AL.

---

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT*

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## MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

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Petitioner contends that the government violated the Privacy Act, 5 U.S.C. 552a, and the Due Process Clause in collecting a debt petitioner owed to the Department of Housing and Urban Development.

1. The facts are set forth in the opinion of the court of appeals (Pet. Supp. App. 1-3). Briefly, in 1973, while employed as an IRS revenue collection agent, petitioner obtained a $5,000 loan guaranteed by HUD. Three years later, petitioner defaulted on the loan. The lender notified petitioner that it was filing a claim with HUD for reimbursement under the loan guarantee. In August 1976, after HUD had paid off the loan, a HUD official sent a letter concerning the default to the personnel office of petitioner's employer. Two of petitioner's superiors met with him to

discuss this heretofore unreported debt.[1] At that meeting, petitioner tendered his resignation, which was accepted. Thereafter, pursuant to the Federal Claims Collection Act of 1966,[2] and implementing regulations,[3] HUD's claim was set off against petitioner's accrued retirement fund.

Petitioner brought this action pursuant to the Privacy Act, 5 U.S.C. 552a, the Fifth Amendment, and 42 U.S.C. 1985(1), against HUD, the IRS, and two of his superiors at the IRS in their individual capacities. Petitioner claimed that HUD violated the Privacy Act in disclosing information regarding the debt to his employer and that the government deprived him of his property without due process by offsetting the debt against his accrued retirement fund. Initially, the action was remanded to the Merit Systems Protection Board for an administrative determination of petitioner's claim of involuntary termination of his employment (see Pet. 5-6; Pet. App. 14). After an agency finding that petitioner had resigned voluntarily, the district court granted summary judgment for the government and

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[1]When it became apparent to the IRS that petitioner had financial problems in 1976, the agency assisted petitioner in the preparation of a repayment schedule. However, petitioner neglected to reveal the existence of this HUD-guaranteed loan, which already had long been in default. See Pet. App. 15.

[2]At the time of the collection activities in question, this Act was codified at 31 U.S.C. 951 *et seq.* Extensive changes have since been made in the Act. See Pub. L. No. 97-365, §§ 3, 10-13, 96 Stat. 1749-1751, 1754-1758 (to be codified at 31 U.S.C. 3701 *et seq.*).

[3]HUD promulgated procedures pursuant to the Federal Claims Collection Act of 1966 that were published at 24 C.F.R. 17.20-17.35 (1976). These regulations provided, inter alia:

> §17.31 Standards for collection of claims.
>
> (b) Collection by offset. Collection by offset will be administratively undertaken on claims which are liquidated or certain in amount in every instance where this is feasible.

the individual defendants on the due process claim and the Section 1985 claim (Pet. App. 13-28). A trial was then held on petitioner's Privacy Act claim. The court found that, in the circumstances of this case, HUD did not willfully or intentionally disclose the debt to the IRS within the meaning of the Privacy Act, 5 U.S.C. 552a(g)(4), and therefore it dismissed petitioner's action (Pet. App. 29-31).

The court of appeals affirmed with respect to the Privacy Act and constitutional contentions (Pet. Supp. App. 1-5).[4] Relying on *Bruce* v. *United States*, 621 F.2d 914 (8th Cir. 1980), the court of appeals held that the district court did not err in finding that HUD, which acted pursuant to established guidelines in the Title I Collection Handbook, did not have the requisite intent to violate the Privacy Act (Pet. Supp. App. 3-4). With respect to petitioner's due process claim, the court explained that a hearing prior to imposition of the setoff was not required because, at that time, petitioner's retirement fund was not even available to him and certainly was not being used by him for the necessities of life. Thus, petitioner's rights were fully protected by a post-deprivation hearing (*id.* at 4-5). In any event, the court explained, petitioner did not dispute either the fact of the debt or the amount and thus there was no colorable claim that the setoff was improper (*id.* at 5).

2. The decision of the court of appeals is correct and does not conflict with any decision of this Court or of any other court of appeals. Accordingly, review by this Court is unwarranted.

a. Petitioner contends (Pet. 7) that the court of appeals erred in finding that any violation of the Privacy Act that occurred here was not "willful" within the meaning of

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[4]The court of appeals reversed the judgment dismissing the Section 1985 claim brought against the IRS personnel in their individual capacities and remanded for further proceedings (Pet. App. 5-7).

5 U.S.C. 552a(g)(4). But there is no reason to disturb this fact-bound conclusion of both courts below (see Pet. Supp. App. 4; Pet. App. 31). As the court of appeals explained, HUD released the loan default information to the IRS in compliance with established guidelines set forth in the Title I Collection Handbook — guidelines whose validity had never been challenged. In light of the facts that the Privacy Act had only recently become effective and the Handbook guidelines were not clearly violative of the Act (see Pet. Supp. App. 4), reliance on these established procedures ought not to be treated as an "intentional or willful" violation of the Act, which could lead to an automatic money recovery of at least $1,000 even in the absence of evidence of actual damages (5 U.S.C. 552a(g)(4)(A)). See, *e.g.*, *Bruce* v. *United States, supra* (compliance with agency regulations directing release of subpoenaed information not "willful" violation of Privacy Act). Indeed, had the events that triggered this lawsuit occurred one year later, the disclosure plainly would not have violated the Privacy Act at all; in 1977, pursuant to notice and comment procedures, HUD specifically listed disclosure to employers for purposes of collecting debts owed to the government as a "routine use" of its loan information that is excepted from the disclosure prohibitions of the Privacy Act. 42 Fed. Reg. 40488 (1977); see 5 U.S.C. 552a(b)(3).

b. Petitioner also contends (Pet. 10-11) that the government's claims collection procedure violated due process. The precise contours of this contention are not clear, but it is apparent that petitioner's constitutional rights were not violated.

First, petitioner has never suggested that he did not in fact owe the debt to HUD. Therefore, as the court of appeals noted (Pet. Supp. App. 5), there were no conceivable grounds for preventing the setoff, and petitioner has alleged no way in which he was prejudiced by the failure to

accord him a pre-setoff hearing. See *Codd* v. *Velger*, 429 U.S. 624 (1977).[5] Second, the setoff was taken from petitioner's retirement account. It did not come out of his paycheck and obviously was not money on which petitioner had been relying for the necessities of life. Therefore, there was no need to afford him a hearing prior to the setoff. See generally *Mathews* v. *Eldridge*, 424 U.S. 319, 340-341 (1976).[6]

Finally, there is no basis for petitioner's suggestion (Pet. 10, 11) that he did not receive adequate notice that his debt was owed to HUD. Obviously, he was made aware of this fact at the latest on August 6, 1976, at the meeting at which he ultimately tendered his resignation. Moreover, the district court expressly found, on the basis of "the uncontroverted record," that "the defendant HUD did by letter give [petitioner] notice and an opportunity to respond concerning his debt" (Pet. App. 23).[7]

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[5]Petitioner appears to have abandoned the contention, which was rejected by the court of appeals (Pet. Supp. App. 5), that he had a constitutional right to a predeprivation hearing so that he would have an opportunity to negotiate with HUD about setting up a payment schedule. See Pet. 10.

[6]Petitioner also appears to contend (Pet. 11) that he was entitled to a hearing because his final salary check was "seized." But no setoff was applied to his salary, and no deduction was made from his final paycheck. It is true that, in the wake of petitioner's sudden resignation, the payment of his final paycheck representing salary and accrued leave was slightly delayed while arrangements were made for the setoff against his retirement account. But it is uncontroverted that this check was paid in full to petitioner only 17 days after his resignation (Pet. App. 15, 19), and neither court below found that there had been a seizure of these funds to satisfy the debt.

[7]Subsequent to the events in this case, Congress has provided for more extensive notice to a debtor whose property is taken by administrative setoff. See Pub. L. No. 97-365, § 10, 96 Stat. 1754-1755 (to be codified at 31 U.S.C. 3716); Pet. Supp. App. 5 n.3.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
*Solicitor General*

JANUARY 1984

DOJ-1984-01